not end there as s. 349 of the Code may later come into play if the person is later reported to be able to make his defence. In the event of the trial proceeding on account of a finding that the a person is of sound mind and capable of making his defence, the Court will still have to consider, in this case in view of the medical report, whether the commission of the offence was the act of a person of unsound mind because s. 84 of the Penal Code says:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law.

Even if a person can successfully avail himself of s. 84 of the Penal Code, the Court must nevertheless, as required by s. 346 of the Code, when acquitting the person, make a finding whether the person committed the act or not.

PUBLIC PROSECUTOR

v.

SIA PUNG KOK & 2 ORS.

HIGH COURT, SIBU
TUAN HAJI MUHAMMAD KAMIL BIN AWANG JC
[CRIMINAL APPEAL NO. 43 OF 1992]
11 OCTOBER 1993

CRIMINAL LAW & PROCEDURE: Charge of knowingly conveying uncustomed goods - Burden of proof in customs cases - Whether prosecution entitled to rely on presumption under s. 119, Customs Act 1967 - Whether goods were in fact uncustomed - Appeal against decision of Magistrate - Whether appellate Court entitled to interfere with finding of fact by Magistrate.

The accused were charged with knowingly conveying uncustomed goods, an offence under s. 135(1)(e) of the Customs Act 1967 (the Act), after customs officers acting on information received had seized the goods and the lorry on which they were being conveyed. The trial Court found as a fact that duty had been paid on the goods and ordered the acquittal and discharge and the return of the goods and lorry to the accused.

On appeal by the prosecution, it was contended that the Magistrate erred in law and in fact in not holding that the goods were uncustomed and contended further that the burden was on the respondents to prove to the contrary under s. 119 of the Act.

On the other hand, it was contended by the respondents that before considering the presumption created by s. 119 of the Act, the prosecution has to show that the goods in question are uncustomed goods and that they are subject to customs duties.

Held:

[1] In customs cases the burden of proof that the goods are dutiable, uncustomed or prohibited is on the prosecution. In appropriate cases the prosecution may rely on s. 119 of the Act that the goods shall be deemed to be dutiable, uncustomed or prohibited to the knowledge of the accused. The effect of s. 119 is that when a customs officer suspects any goods to be uncustomed goods he is entitled to seize the goods. The respondents contention to the contrary is not consistent with the preponderance of authorities.

[2] On the balance of probabilities it is more likely than not that the goods were not uncustomed and that they were repacked into cases in which they were found on 15 June 1991. The Court was satisfied that the learned Magistrate had not misdirected herself on the evidence before her and that she had come to a correct conclusion.

[3] As for the respondents cross-appeal against the Magistrate's order for the stay of the order of discharge and acquittal pending appeal, it has been overtaken by events and should be dismissed.

[Appeal and cross-appeal dismissed. Order of Magistrate affirmed].

Cases referred to:
Public Prosecutor v. Lim Joo Soon [1978] 2 MLJ 127 ***(refd)***
Loo Soon Yeu v. Public Prosecutor [1980] Melaka Criminal Appeal No. 15 of 1980 ***(foll)***
Public Prosecutor v. Tay Yew Lia [1957] 23 MLJ 17 ***(foll)***
Public Prosecutor v. Fatimah [1960] MLJ 109 ***(foll)***
Public Prosecutor v. Chieng Ung Kai [1993] 1 MLJ 23 ***(not foll)***
Ng Eng Kooi & Anor. v. Public Prosecutor [1970] 1 MLJ 267 ***(refd)***
Tay Kheng Hong v. Heap Moh Steamship Co. Ltd. [1964] 30 MLJ 87 ***(refd)***

Legislation referred to:
Customs Act 1967, ss. 119, 135(1)(e), (i)

For the appellant - Abdul Rahman bin Sebeli, DPP
For the respondents - Chew Peng Hui; M/s. Battenberg & Talma

JUDGMENT

Haji Muhammad Kamil Bin Awang JC:
The 1st and 2nd respondents/accuseds were charged as follows:

> That you jointly at about 11.15 a.m. on 15 June 1991 at Kilometre 100, Sibu/Bintulu Road, Sibu in the State of Sarawak were knowingly concerned in conveying uncustomed goods, to wit 1,560 cartons x 24 cans x 330 ml. of Heineken can lager beer totalling 12,355.20 litres with intent to defraud the Government of the duties thereon, to wit RM49,901.28 and that you thereby committed an offence under s. 135(1)(e) and punishable under s. 135(1)(i) of the Customs Act 1967.

The 3rd respondent was charged as follows:

> That you, Ting Sie Tiing, Director of Thiang Sung Enterprise Sdn. Bhd., Lot 608, No.11, 2nd Floor, Jalan Permaisuri, Miri, at about 11.15 a.m. on 15 June, 1991 at kilometre 100, Sibu/Bintulu Road, Sibu in the State of Sarawak were knowingly concerned in conveying uncustomed goods, to wit 1,560 cartons x 24 cans x 330 ml. of Heineken can lager beer totalling 12,355.20 litres with intent to defraud the Government of the duties thereon, to wit RM49,901.28 and that you thereby committed an offence under s. 135(1)(e) and punishable under s. 135(1)(i) of the Customs Act 1967.

At the close of the prosecution case all the three respondents were acquitted and discharged without calling for their defence and the goods and lorry were ordered to be returned to the respondents.

The Deputy Public Prosecutor appealed against the order of acquittal and discharge and the return of the goods and the lorry to the respondents. The respondents cross-appealed against the Magistrate's order for the stay of the order pending the appeal.

The simple facts of the case are as follows:

On 15 June 1991, a lorry carrying allegedly uncustomed goods was parked with a deflated tyre at Kilometre 100, Sibu/Bintulu Road, with 2 men (1st and 2nd respondents) guarding them. Acting on information, the customs officers from Sibu went to the scene and found the lorry at the roadside, laden with goods and seized the goods and lorry and subsequently handed them over to their counterpart, the Bintulu Customs.

The learned Deputy Public Prosecutor submitted 7 grounds of appeal but proceeded on 2 main grounds; that the Magistrate erred in law and in fact in not holding that goods were uncustomed and that the goods were uncustomed at the relevant time and under s. 119 of the Customs Act 1967, the burden was on the respondents to prove to the contrary.

In customs cases, the burden of proof that the goods are dutiable, uncustomed or prohibited is on the prosecution. In appropriate case, the prosecution may rely on s. 119 of the Customs Act 1967 that the goods shall be deemed to be dutiable, uncustomed or prohibited to the knowledge of the accused - see *Public Prosecutor v. Lim Joo Soon* [1978] 2 MLJ 127. Wan Yahya J. (as he then was) in *Loo Soon Yeu v. Public Prosecutor* [1980] Melaka Criminal Appeal No.15 of 1980 stated that:

> section 119, not being a presumption, does not require the prosecution to lay the groundwork

> before its operation. The prosecution need not prove the goods are or are likely to be uncustomed before they can rely on that section. The effect of s. 119 is that when a customs officer suspects any goods to be uncustomed goods he is entitled to seize the goods.

See *Public Prosecutor v. TayYew Lia* [1957] 23 MLJ 17 and *Public Prosecutor v. Fatimah* [1960] MLJ 109.

The defence drew the Court's attention to the case of *Public Prosecutor v. Chieng Ung Kai* [1993] 1 MLJ 23 where it was held that before considering the presumption created by s. 119 of the Act, the prosecution has to show that the goods in question are uncustomed goods and that they are subject to customs duties. With respect, I cannot accept this proposition as it is not consistent with the preponderance of authorities, *viz. Loo Soon Yeu's* case (*supra*), *Public Prosecutor v. Tay Yew Lia* (*supra*) and *Public Prosecutor v. Fatimah* (*supra*).

Section 119 of the Customs Act states:

> If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for the recovery of any penalty or penalties under this Act, any dispute arises whether the customs duties have been paid in respect of such goods, or whether the same have been lawfully imported or exported or lawfully landed or loaded, or concerning the place whence such goods were brought or where such goods were loaded, or whether anything is exempt from duty under s. 14 then and in every such case the burden of proof thereof shall lie on the defendant in such prosecution.

The Federal Court in *Ng Eng Kooi & Anor. v. Public Prosecutor* [1970] 1 MLJ 267 stated that:

> what the accused has to do is to satisfy the Court on the balance of probabilities that it is more likely than not that the fact which he seeks to prove or disprove exists or does not exist.

In the present case, the learned Magistrate in the grounds of decision stated:

> In cross-examination, PW1 testified that item 3 are customs documents No. 101317 (ID.3) and No. 102958 (ID.4) and said that at the bottom of the declaration show that the duty had been paid. PW8 also in the cross-examination told the Court that the accused did tell that the beer was re-packed.

There is no evidence on which it could be said that this is not true. As a matter of fact PW8 in his testimony opined that the goods seized were covered by ID.3 and ID.4.

The prosecution relied on a Singapore customs sticker (Ex. P2) as evidence that the goods were imported. "The prosecution evidence to say that there was such importation was only on the Singapore customs sticker (Ex. P2) placed at the edge of the cases/boxes." PW2, PW4 and PW8 (I.O.) said that they never saw the sticker before. In the opinion of PW4 and PW8 that sticker could be made anywhere at all, even in Sibu. Assuming that the goods were imported, there is the evidence of PW1 and PW8 to say that the duty had been paid. The goods were repacked into wooden cases and there is no evidence to disprove this contention. On the balance of probabilities it is more likely than not that the goods were not uncustomed and that they were repacked into cases in which they were found on 15 June 1991. The learned Magistrate after reviewing the facts of the case, was satisfied and came to a finding on a specific fact that:

> Based on the evidence before the Court, I (am) of the opinion that goods were covered by declaration ID.3 and ID.4. As such there was no intention of the accused persons to defraud the Government of the duty.

Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] 30 MLJ 87 said:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on a question of fact. The principles upon which an appellate court should act in reviewing the decision of a Judge of first instance were stated by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 1 All ER 582.
>
> Where a question of fact has been tried by a Judge without a jury, and there has been no misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the pointed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witness, could not be sufficient to explain or justify the trial Judge's conclusion.

I am satisfied that the learned Magistrate had not misdirected herself on the evidence before her and that she had come to a correct conclusion. In the circumstances, the appeal against both the acquittal and the forfeiture is dismissed. As for the cross-appeal it has been overtaken by events, the cross-appeal is dismissed.

The order of the Magistrate is affirmed and the money to be returned to the owner i.e. proceeds of sale of the goods and amount paid for the lorry.

RE: KAMAL BAHARIM BIN HUSSAIN; *EX PARTE*: PUBLIC FINANCE BHD.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[BANKRUPTCY NO. 29-380-92]
19 MAY 1993

BANKRUPTCY: Non-compliance of demand contained in bankruptcy notice - Bankruptcy notice issued based on judgment in default - Section 92 Bankruptcy Rules 1969 - Application by debtor for extension of time to file an application to set aside bankruptcy notice and for bankruptcy notice to be set aside - Inherent jurisdiction of Court - Miscarriage of justice - Debtor did not give notice of dispute as provided under s. 3(2)(ii) of Bankruptcy Act 1967 - Whether debtor can challenge validity of bankruptcy notice - Affidavit in support of application to set aside bankruptcy notice - Whether filing of affidavit constitutes sufficient notice to creditor within meaning of s. 3(2) of Act.

This was an application by the debtor firstly, for an extension of time to file an application to set aside the bankruptcy notices; and secondly, for the bankruptcy notice to be set aside with costs.

Held:

[1] The affidavit in support of the debtor's application to set aside the bankruptcy notice constituted sufficient notice to the creditor within the meaning of s. 3(2) of the Bankruptcy Act 1967.

[2] The time expired to file the application to set aside the bankruptcy notice was extended forthwith to enable the application to set aside the bankruptcy notice to be heard.

[3] The proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 was limited to excess demand and therefore not applicable to the instant case where the demand for payment in the bankruptcy notice was not in accordance with the terms of the judgment in default as required under s. 3(1)(i) of the Bankruptcy Act 1967. In the instant case, the demand for payment in the bankruptcy notice was in accordance with the terms of an agreement subsequently entered by the parties.